Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promoting Efficient Use of Spectrum	)	**WT Docket No. 00-230**
Through Elimination of Barriers to the	)	
Development of Secondary Markets	)	

To: The Commission

COMMENTS OF THE
RURAL TELECOMMUNICATIONS GROUP

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SUMMARY

The Rural Telecommunications Group (RTG) enthusiastically supports the Commission's proposal to create a secondary market in spectrum usage rights. As RTG has explained to the Commission on several occasions, the FCC's primary market method for awarding spectrum -- auctions -- has done a disservice to those living in rural parts of our country. RTG hopes that spectrum leasing and other secondary market mechanisms will rectify a situation in which rural carriers typically have potential wireless customers, but no spectrum assets, while spectrum licensees are unwilling to serve rural and less populated areas or share their spectrum usage rights with rural carriers. To date, less than 1/10 of one (1) percent of all auctioned licenses have had even one instance of partitioning or disaggregation that would put fallow spectrum to use serving willing consumers.[1]

Spectrum leasing has the potential of bringing the benefits of the wireless and digital broadband revolution to even the remotest portions of the United States. The Commission must, however, ensure that it fashions a leasing regime that creates the correct incentives for spectrum holders to voluntarily lease portions of their spectrum usage rights to rural and smaller carriers. The Commission's proposal does just the opposite.

RTG urges the Commission to rethink its approach to apportioning rights and responsibilities between licensee/lessors and spectrum user/lessees. Rather than imposing liability on lessors for the bad acts of lessees, the Commission should focus its compliance and enforcement resources on the beneficial, day-to-day operator of the spectrum usage right—the lessee. With the specter of forfeitures and even license revocations facing them due to the independent actions of lessees, few licensees will risk the leasing of spectrum for the little incremental income it provides.

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1 *See, SECONDARY MARKETS FOR RADIO SPECTRUM*, Remarks of Caressa Bennet, Counsel for the Rural Telecommunications Group, before the Federal Communications Commission**,** May 31, 2000. (Reprinted at www.bennetlaw.com).

The Commission has more than ample legal authority to regulate users of the radio spectrum who do not hold FCC licenses. In fact, its entire radio tower enforcement regime is targeted at non-licensees who own towers, not the licensees on the tower, and RTG has no evidence that this focus adversely impacts FCC resources or the public's safety. With a properly executed due diligence scheme, the Commission can be made aware of all lessees' identities and location and thereafter conduct compliance and enforcement actions against the actual users of the spectrum.

The Commission properly recognizes that its current test for determining the existence of an unauthorized *de facto* (actual) transfer of control of a license, reflected in its 1963 *Intermountain Microwave* decision, is totally incompatible with the leasing arrangements that the Commission intends to authorize here. Lessors cannot be expected to have unfettered use of a lessee's facilities and equipment; control its daily operations; hire and dismiss its employees; handle the lessee's financial obligations; and receive the lessee's revenues and profits. Yet the Commission proposes to replace the *Intermountain Microwave* factors with a test of *de facto* control that provides licensees with a Hobson's choice; since the Commission proposes to make the licensee strictly liable for the actions of its lessees, the licensee can either practice the daily oversight of lessee operations that the Commission proposes to no longer require, or face the risk of fines and revocations for lessee actions of which it is unaware.

Instead of this approach, RTG proposes that the Commission adopt a functional approach to assessing a licensee's control that imposes upfront responsibilities on licensees followed by continuing compliance responsibilities on lessees. This functional approach would work as follows:

- A licensee follows the Commission's checklist for determining the initial eligibility of a lessee to use of spectrum;

- A licensee informs each lessee of a lessee's service, technical and operational obligations within the body of a lease;
- A licensee requires that the lessee acknowledge and submit to Commission jurisdiction through a certification in the lease by the lessee that it will comply with Commission rules, policies, and laws and that it recognizes the authority of the Commission or licensee to cancel a lease for failure to comply;
- A licensee requires that all lease terms be committed to writing;
- A licensee retains a record of all leases, FCC filings and coordination/interference agreements reached by its lessees;
- A licensee makes these records available to the Commission upon request;
- For each lease, a licensee submits identifying information to the Commission that allows the Commission to identify and contact each lessee;
- A licensee commits to assist the Commission in identifying non-complying lessees and to take all reasonable steps to halt non-compliance brought to its attention.

After the leasing parties properly complete this process, the lessee would be permitted, absent a restriction in its lease, to independently:

- Conduct coordination efforts and reach interference agreements with other licensees;
- Fashion its network to comply with FCC technical requirements;
- File routine documents directly with the Commission with notice to the licensee;
- Select its own regulatory status in bands that permit this choice;
- Build out and operate its system without further consent or oversight from the licensee.

The Commission can further improve the economic incentives for a lessee's investments in leased spectrum usage rights by permitting the parties to negotiate long-terms leases subject only to the renewal of the underlying license. The Commission should also allow the leasing parties to incorporate purchase options and/or rights of first refusal clauses to permit a lessee to purchase a license in the event that a licensee becomes legally disabled or allows a license to lapse.

RTG also suggests that the Commission further delineate what it means by "spectrum usage rights" and "leasing" to provide entities with guidance as to how spectrum leasing differs, if at all, from the ordinary commercial leasing so prevalent in all industries today.

With that definition in place, the Commission should extend the authority to lease spectrum usages rights to as many radio services and bands as possible. The widest possible use of leasing, subject to existing Commission eligibility, technical and service rules, promotes the public interest by allowing for the more efficient use of this limited resource and opening the possibility for expanded wireless services in rural and less populated areas of the United States.

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